section may not be used to accomplish what is in effect a merger.[29] If the merger device had been used here, and if the dissenters had elected to take the appraised value of their shares, a question of valuation would be raised, of course, similar to the question involved in the principal case.[30]

The case has been remanded to the district court for the determination of damages in accordance with the opinion of the appellate court. This will be found to be no easy task. It is not impossible that the difficulties may lead the district court to find that the value of the minority's stock in this "going prosperous concern" is actually no more than their proportionate share of the value of the physical assets. In that event, if the district court should make findings adequately analyzing the source of the steamship company's earnings, it should not be impossible to induce the appellate court to sustain the decision.

PROHIBITIONS AGAINST MULTIPLE STATE INHERITANCE TAXATION OF INTANGIBLES REMOVED*

The State Tax Commission of Utah taxed[1] shares of stock of a Utah corporation that were transferred at the death of a New York domiciliary. In a proceeding before the trial court the administrator's contention that the inheritance tax was invalid under the holding of *First National Bank of Boston v. Maine*[2] was sustained. The Supreme Court of Utah upheld the trial court,[3] specifying that

[29] The holding of the Inland decision might be construed to support this distinction since there is language in the case that implies that the so-called dissolution was a weak device by means of which the majority stockholder appropriated the transportation business of its subsidiary. If this is the true construction to be put on the opinion, however, it is difficult to reconcile it with the previous decision in which the steel company was permitted to proceed with its plans to dissolve the subsidiary and purchase its assets; cf. Allaun v. Consolidated Oil Co., 16 Del. Ch. 318, 147 Atl. 257 (1929); In re Doe Run Lead Co., 283 Mo. 646, 223 S.W. 600 (1920); Theis v. Spokane Falls Gas Light Co., 34 Wash. 23, 74 Pac. 1004 (1904).

[30] See Lattin, Remedies of Dissenting Stockholders under Appraisal Statutes, 45 Harv. L. Rev. 233 (1931); Levy, Rights of Dissenting Shareholders to Appraisal and Payment, 15 Corn. L. Q. 420 (1930).

* State Tax Com'n of Utah v. Aldrich, 316 U.S. 174 (1942).

[1] Utah Rev. Stat. Ann. (1933) §§ 80–12–2, 80–12–3.

[2] 284 U.S. 312 (1932). The Court held invalid under the Fourteenth Amendment the attempt by Maine, the state of incorporation as well as the situs of the corporate property, to tax the transfer-by-death of shares of stock owned by a Massachusetts domiciliary. Massachusetts had taxed the transfer as the state of domicile of the shareholder. This ruling was the culmination of the outlawing of double taxation of intangibles which was begun in 1930 in Farmers Loan and Trust Co. v. Minnesota, 280 U.S. 204 (1930), and continued in Baldwin v. Missouri, 281 U.S. 586 (1930), and Beidler v. South Carolina Tax Com'n, 282 U.S. 1 (1930).

[3] 116 P. (2d) 923 (Utah, 1941).

until the *First National Bank* case was expressly overruled by the Supreme Court, the deviation made from it in *Curry v. McCanless*[4] had to be confined to its facts. On writ of certiorari, the Supreme Court *held*, judgment reversed. Since Utah has power over the corporation by virtue of its corporation law, which also protects and benefits the stock, Utah may tax the transfer even though the result is multiple taxation. *State Tax Com'n of Utah v. Aldrich.*[5]

After a ten-year period during which state multiple taxation had been held invalid,[6] the Court, in the instant case, expressly reversed the trend. Decisions[7] which were made prior to that period and which upheld such taxes were held, rather, to have been sound. The Court in those earlier decisions had held that a state could tax whenever it had power over the subject-matter or over the persons involved, or whenever it had given protection or benefit either by its laws or by maintaining an "orderly society," and this theory was adopted by the present court.

Mr. Justice Frankfurter formulated the doctrine thus: "The simple but controlling question is whether the state has given anything for which it can ask return."[8] Unfortunately the Court did not offer any standards by which the state's compensation could be measured in accordance with the benefit given. It appears that once a state has the right to tax, it can impose the same tax-rate on a partially benefited non-resident that it does on those enjoying the full benefits conferred by the state upon its residents.[9]

Another source of doubt lies in the Court's failure to draw any clear distinction between tangible and intangible property.[10] In *Curry v. McCanless*[11] the Court said that a state might tax as intangibles a share of stock or a contract or a mortgage.[12] At the same time the Court observed that intangibles "are but re-

[4] 307 U.S. 357 (1939). In a 5–4 decision, the Court permitted the taxation of intangibles of a testamentary trust by both Tennessee, the domicile of the decedent settlor who had reserved powers of management and a power of appointment, and Alabama, the domicile of the trustee and the location of the intangibles. The Court denied that the Fourteenth Amendment provided a rule of immunity against double taxation. The language of the Court could be interpreted as an overruling of the cases supporting a prohibition against double taxation. Dodd, Cases on Constitutional Law 1103 (3d ed.1941).

[5] 316 U.S. 174 (1942).

[6] Note 2 supra.

[7] Prior to 1930 the benefit and protection theory had been applied by the Court to validate multiple taxation. Blackstone v. Miller, 188 U.S. 189 (1903); Harding, Double Taxation of Property and Income 13–21 (1933); Stinson, The Due Process of State Taxation, 29 Geo. L. J. 271, 275 n. 15 (1940).

[8] Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444 (1940).

[9] Dix, Must We Carry Our Stocks and Bonds in Our Pockets?, 15 Ind. L. J. 373 (1940).

[10] "Tangible Personal Property" and the Law of Inheritance Taxation, 35 Yale L. J. 357 (1926); "Double" Inheritance Taxation of Intangibles, 40 Yale L. J. 99 (1930).

[11] 307 U.S. 357 (1939). [12] Ibid., at 365 n. 3.

lationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts."[13] Strictly speaking, all property consists of relationships. Therefore, the Court attempted to go further, for it specified that a right which could be directly related to a physical object was a tangible.[14] In this setting the traditional notions of corporate fictions facilitate understanding a tax imposed upon shareholders. The mortgagees' position, however, is difficult to grasp. The security interest as such of the mortgagee has long been a favorite of the courts; there seems to be little doubt that the right is directly related to a physical object.[15] The instant case does not dispel the doubts created by former decisions concerning intangibles.

It can hardly be supposed that the Court is unaware of all the undesirable effects of multiple taxation. It is in spite of this awareness that the Court has, for reasons not too obvious, returned the problem to the states. The language of the Court would seem to permit a strong inference that here is another instance where the justices hesitate to inject their personal predilections.[16] Furthermore, the states are not restricted in this taxing field in any constitutional manner.[17] Reasoning in this manner, the Court can say, and their sincerity cannot be questioned, "Whether a tax is wise or expedient is the business of the political branches of government, not ours."[18] Historically, states have enjoyed the privilege of taxing intangibles, notwithstanding that the result is multiple taxation, and the Court feels this strengthens its position.[19]

Another element is involved in the fact that modern businesses have continued to extend their operations through many states which all contribute to the well-being of the enterprise. The Court is convinced that each state is the proper judge of the price a business, or one benefiting from that business, should pay for the privilege granted.[20] Certainly no exception can be taken to this position of the Court. As stated above, however, a genuine problem exists regarding sensible payment for the benefit given. For example, what is the status of the holding in a case like *Rhode Island Hospital Trust Co. v. Doughton?*[21] There the Court refused to allow a state to impose a death transfer tax on corporate shares when two-thirds of the corporate property and a part of its general business activity occurred within its jurisdiction. The Court said that a shareholder is not

[13] Ibid., at 366.

[14] Ibid., at 364–66.

[15] 5 Tiffany, Law of Real Property §§ 1379, 1380 (3d ed. 1939); but compare Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke, 300 U.S. 440 (1937) with Wright v. Union Central Life Ins. Co., 311 U.S. 273 (1940).

[16] Braden, Umpire to the Federal System, 10 Univ. Chi. L. Rev. 27, 28 (1942).

[17] Wisconsin v. J. C. Penney Co., 311 U.S. 435, 445 (1940); Curry v. McCanless, 307 U.S. 357, 373–74 (1939); Newark Fire Ins. Co. v. State Bd. of Tax Appeals, 307 U.S. 313, 323–24 (1939).

[18] State Tax Com'n of Utah v. Aldrich, 316 U.S. 174, 184 (1942).

[19] Ibid., at 176–78.

[20] Ibid., at 183–84.

[21] 270 U.S. 69 (1926).

the owner of the corporate property and that jurisdiction over the property did not confer a right to tax the shareholder. Under the benefit theory emphasized in the instant case, the strength of the *Rhode Island* case loses force. Although a long established fiction exists that a shareholder is not the owner of the corporate property,[22] the fiction need not be destroyed in order to allow the Court to decide that protection to the corporate property can measure the protection to the corporate shares.[23]

In allowing the states to indulge in this taxing competition the Court seems to rely on the states' ability and willingness to face and solve this problem. Experience has taught us, however, that judicial and administrative rulings on the reciprocal legislation that is written during these cooperative state moves will result in a prolific source of litigation.[24] It is doubtful whether problems of uniformity in rates, methods of computation, and formulae for equitable apportionment[25] can be left to those whose self-interest may tend to overvalue the benefit given the taxpayer.[26] Nevertheless, the Court's refusal to indulge in judicial legislation may be laudable. The only sensible solution at hand despite possible constitutional questions seems to be a system of federal taxation accompanied by revenue apportionment to the states perhaps in a manner comparable to grants-in-aid.[27] Since the problem requires intensive thought and planning, presumably the Court would prefer that the appeal be made to Congress. While some economists[28] and lawyers[29] favor this solution, the class most adversely affected by the intangible rule established in the instant case is hardly likely to bring sufficient pressure to bear on the legislature to move them to action.[30]

[22] 1 Fletcher, Cyc. Corp. § 31 (1931).

[23] Cf. Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940), noted in 8 Univ. Chi. L. Rev. 605 (1941).

[24] This observation was made in Mr. Justice Jackson's dissent. State Tax Com'n of Utah v. Aldrich, 316 U.S. 174, 199 (1942).

[25] Reciprocal and Retaliatory Tax Statutes, 43 Harv. L. Rev. 641, 643–45 (1930). This question might be posed: If the states are faced with reciprocal legislation as the only answer to this problem, how long will it take to get results? After thirty-five years, only thirty-four states have accomplished the relatively simple task of adopting the Uniform Sales Act.

[26] Hellerstein and Hennefeld, State Taxation in a National Economy, 54 Harv. L. Rev. 949, 960–61, 975–76 (1941); Reciprocal and Retaliatory Tax Statutes, 43 Harv. L. Rev. 641, 646 (1930); Legislative Efforts in New York to Avoid Multiplicity in Inheritance Taxation, 28 Col. L. Rev. 806, 807 n. 6 (1928). After the First National Bank case, New York amended its constitution so that a non-resident would not be taxed for intangibles found within the state of New York. N.Y. Const. Art. 16, § 3. New York will be forced to amend its constitution to take advantage of the ruling in the instant case.

[27] Dodd, The Decreasing Importance of State Lines, 27 A. B. A. J. 78, 83, 84 (1941).

[28] Buehler, Public Finance 473–74 (2d ed. 1940); Shoup, Facing the Tax Problem 26–27, 370 (1937); compare Simons, Personal Income Taxation 214–18 (1938).

[29] Hellerstein and Hennefeld, op. cit. supra note 25, at 963.

[30] Dissenting opinion of Mr. Justice Jackson. State Tax Com'n of Utah v. Aldrich, 316 U.S. 174, 195–96 (1942).